

1 HONORABLE RICHARD A. JONES
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY MATSON,

Plaintiff,

v.

UNITED PARCEL SERVICE, INC.,

Defendant.

CASE NO. C10-1528 RAJ

ORDER

On November 5, 2013, the court held a pretrial conference. During the conference, the court indicated that it would take two issues under submission: (1) whether defendant may call Doug Christensen as a rebuttal witness if Ms. Matson testifies about the choking incident, where he was not previously disclosed as a witness by defendant; and (2) whether defendants should be permitted to assert four defenses not previously asserted in the pretrial order or proposed jury instructions during the first trial. The court requested additional briefing, not to exceed three pages, regarding the former. Defendant submitted a brief in support of its position regarding the latter, and the court granted plaintiff the opportunity to respond in writing. The court has reviewed all materials submitted.

1 **A. Mr. Christensen as a Rebuttal Witness**

2 Defendant argues it should be permitted to call Mr. Christensen as a rebuttal
 3 witness because it could not have foreseen the need to identify him prior to Ms. Matson's
 4 testimony at trial. Dkt. # 208. Plaintiff argues that UPS had knowledge that plaintiff
 5 would testify about the choking incident involving Mr. Christensen during discovery, and
 6 defendant's failure to disclose him as a witness for the first trial should preclude UPS
 7 from disclosing him as a rebuttal witness for the retrial. Dkt. # 206.

8 Rule 37(c)(1) provides that a party failing to provide information or identify a
 9 witness as required by Rule 26(a) or (e) "is not allowed to use that information or witness
 10 to supply evidence on a motion, at a hearing, or at a trial, unless the failure was
 11 substantially justified or is harmless." Fed. R. Civ. Proc. 37(c)(1); *Hoffman v. Lopez*, 541
 12 F.3d 1175, 1179 (9th Cir. 2008). Parties are required to provide the name and contact
 13 information of any individual likely to have discoverable information "that the disclosing
 14 party may use to support its claims or defenses, unless the use would be solely for
 15 impeachment." Fed. R. Civ. Proc. 26(a)(1)(A)(i). Parties are also required to provide the
 16 other party the name and contact information of any witnesses, "separately identifying
 17 those the party expects to present and those it may call if the need arises." Fed. R. Civ.
 18 Proc. 26(a)(3)(A)(i). Parties are also required to supplement these disclosures "in a
 19 timely manner if the party learns that in some material respect the disclosure or response
 20 is incomplete or incorrect, and if the additional or corrective information has not
 21 otherwise been made known to the other parties during the discovery process or in
 22 writing[.]" Fed. R. Civ. Proc. 26(e)(1)(A).

23 The court has broad discretion "to manage the cases before it efficiently and
 24 effectively." *See Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005)
 25 ("The abuse of discretion standard is deferential, and properly so, since the district court
 26 needs the authority to manage the cases before it efficiently and effectively."). "Parties
 27 must understand that they will pay a price for failure to comply strictly with scheduling

1 and other orders, and that failure to do so may properly support severe sanctions and
 2 exclusions of evidence." *Id.*

3 Here, UPS was alerted to the potential need for Mr. Christensen to testify as a
 4 witness during discovery. In her complaint, plaintiff alleged that in December 2009, "one
 5 of defendant's male employees assaulted plaintiff on the job, injuring the plaintiff." Dkt.
 6 # 1 at 8 (Compl. ¶ 9). On January 28, 2011, plaintiff responded to defendant's first
 7 interrogatories and requests for production. Defendant propounded interrogatory 1: "To
 8 the extent not already identified in your initial disclosures, please identify each person
 9 who you believe has knowledge that relates to the allegations in your Complaint and
 10 summarize the knowledge that you believe each person has." Dkt. # 200-3 at 5. Plaintiff
 11 responded, among others, "Doug Christensen –Early AM Driver (EAM) co-worker (Guy
 12 who choked me) – knowledge of discrimination, retaliation, harassment." Dkt. # 207-2 at
 13 2. On June 16, 2011, plaintiff propounded her first set of interrogatories and requests for
 14 documents, and asked, among others, the following:

15 INTERROGATORY NO. 13: Please describe UPS' policies and
 16 procedures, whether formal or informal, regarding workplace violence,
 17 including physical assaults, threats of physical assaults, and verbal
 18 altercations, in place at BFI during the time period of the Plaintiff's
 19 employments, including in your answer any changes or updates to such
 20 policies and procedures.

21 * * *

22 REQUEST FOR PRODUCTION NO. 20: Produce the documents referring
 23 or relating to incidents of workplace violence and security issues or other
 24 problems between UPS employees, including, but not limited to, physical
 25 assaults, threats of physical assault, or verbal altercations, at BFI for the
 26 time period that the Plaintiff was employed by UPS.

27 * * *

REQUEST FOR PRODUCTION NO. 21: Produce the documents referring
 or relating to the physical incident that occurred between Doug Christensen
 and the Plaintiff, including, but not limited to, any warnings, reprimands,

1 memoranda, notes, reports, intra- and inter-office communications, and
 2 termination or resignation documents.

3 Dkt. # 207-1 at 17.

4 Given the fact that plaintiff alleged a physical assault in her complaint, disclosed
 5 the choking incident with Christensen during discovery as evidence of discrimination,
 6 retaliation, and harassment, and sought discovery regarding the choking incident and
 7 defendant's policies and procedures regarding physical assaults, the court finds that
 8 defendant was not substantially justified in failing to name Christensen as a witness for
 9 the first trial.¹ Defendant also argues that Ms. Matson's testimony that was admitted over
 10 objections included double hearsay. Dkt. # 208 at 3. However, the only objections
 11 raised by defendant at trial to this line of testimony were relevance and prejudice. Dkt. #
 12 139 at 11:6-17, 34:11-24). Defendant did not raise a hearsay objection during trial. The
 13 court overruled the relevance and undue prejudice objections because the choking
 14 incident and management's conduct following the incident were relevant to plaintiff's
 15 hostile work environment claim, and while a degree of prejudice existed, the court found
 16 that the undue prejudice standard had not been met. *Id.* at 36:6-24.

17 In arguing that the delay in identifying Mr. Christensen as a witness is harmless,
 18 defendant attempts to shift the burden of discovery on Ms. Matson. However, at the time
 19 that defendant identified Mr. Christensen as a witness in June 2013, discovery had long
 20 been closed. Matson could not seek discovery of Mr. Christensen, as doing so would
 21 have violated a court order setting the deadline for discovery as January 20, 2012. Dkt. #
 22 21. Defendant also attempts to shift blame to plaintiff by arguing that she knew that Mr.
 23 Christensen could be called as a witness because she identified him as having knowledge
 24 about the case in her discovery responses. Dkt. # 208 at 2. However, it is defendant's

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 26 ¹ Needless to say, the court also finds that Ms. Matson's testimony regarding the choking
 27 incident was neither "new" nor previously undisclosed.

1 responsibility to disclose all witnesses it may call at trial. Fed. R. Civ. Proc.
2 26(a)(3)(A)(i). Failing to disclose Mr. Christensen as a potential witness deprived
3 plaintiff of the opportunity to depose Mr. Christensen. Accordingly, the court finds that
4 the failure is not harmless.

5 For all the foregoing reasons, the court excludes Mr. Christensen as a witness.

6 **B. Defendant's Additional Defenses**

7 On February 13, 2013, the court found that Ms. Matson's claim for hostile work
8 environment is supported by the following evidence that management: (1) disregarded
9 her complaints of hostility in the work place (Dkt. # 139 at 10:20-11:10); (2) yelled at her
10 (Dkt. # 138 at 178:23-179:5; (3) threatened to file charges against her if she continued to
11 complain (Dkt. # 138 at 178:6-21, # 139 at 10:20-11:5); (4) failed and refused to do
12 anything when she requested help to move a 150-pound package, and instead "clenched
13 up his fists, put them behind his back, and stepped right into my face, gritted his teeth,
14 and said 'you get to deliver it, don't you?'" (Dkt. # 138 at 155:14-156:13); (5) failed to
15 report or otherwise resolve a physical assault on Ms. Matson prior to Ms. Matson
16 reporting it to a separate manager (Dkt. # 139 at 38:13-39:7, 39:19-40:16); (6) assigned
17 her a less desirable package car instead of a van where all the men had the more desirable
18 vans (Dkt. # 138 at 179:16-180:8); (7) humiliated her at a termination meeting at which
19 seven men at the meeting accused her of lying and stealing time (while not also charging
20 a male co-worker with stealing time for the same incident) and at least one yelled at her
21 (Dkt. # 138 at 184:20-24, 185:14-16 187:13-188:4; # 139 at 6:21-7:12, 195:2-24, 196:10-
22 16); and (8) openly mocked her in front of her co-workers (Dkt. # 138 at 156:9-13,
23 178:23-179:5; # 139 at 10:2-19, 195:2-24). Dkt. # 159 at 6-7.

24 In its proposed pretrial order that was filed on October 29, 2013, defendant
25 identified four affirmative defenses it had not identified in its pretrial order that preceded
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1 the first trial: (1) plaintiff incited² the conduct she alleges constituted a hostile work
 2 environment; (2) plaintiff failed to exhaust her administrative remedies; (3) plaintiff has
 3 no evidence that the remaining allegations occurred because of her gender; and (4)
 4 plaintiff's claims are not sufficiently related as to coalesce into a single hostile work
 5 environment claim. *Cf.* Dkt. # 194 at 3 *with* Dkt. # 85 at 2.³

6 Defendant argues that plaintiff's current hostile work environment claim was
 7 crafted during trial, and that the following allegations were not disclosed prior to trial:
 8 (1) Eric Candelaria disregarded her complaints of hostility in the workplace; (2) Mr.
 9 Candelaria yelled at her; (3) Mr. Candelaria threatened to file charges against her; (4) Ms.
 10 Matson was mistreated during the investigatory meeting; and (5) UPS management failed
 11 to report or resolve a physical assault on Ms. Matson. Dkt. # 199 at 3. However, it
 12 appears from the record that sufficient information was disclosed during discovery that
 13 would have put UPS on notice regarding the nature of her allegations. *See* Trial Ex. 14⁴
 14 (Norby's notes during Matson interview indicating two women and four men present
 15 questioning her about falsifying records); Trial Ex. 36⁵ (memoranda regarding choking
 16 incident); Trial Ex. 140⁶ (Nov. 2009 letter to Mr. Candelaria describing complaints of
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 19 ² The court notes that one of the elements of the hostile work environment instruction
 20 provides that "this conduct was unwelcome in the sense that Ms. Matson regarded the conduct as
 21 undesirable and offensive, and did not solicit or incite it."

22 ³ The court notes that in the June 25, 2012 pretrial order, plaintiff appears to have limited
 23 her hostile work environment claim to "assignment of work and vehicles." Dkt. # 85 at 2.
 24 However, her trial brief indicated the existence of other allegations that supported her claim:
 25 "Hostile Work Environment on the Basis of Gender: UPS' managers used, *inter alia*, work
 26 assignments that favored male UPS employees as a means to harass Ms. Matson and create a
 27 hostile work environment for female employees." Dkt. # 86 at 15.

28 ⁴ Exhibit 14 bears the date-stamp UPS 0113, indicating that UPS produced this document
 29 during discovery.

30 ⁵ Exhibit 36 bears the date-stamp UPS 1041, indicating that UPS produced this document
 31 during discovery.

32 ⁶ Exhibit 140 bears the date-stamp PLTF 1757, indicating it was produced by plaintiff
 33 during discovery.

1 hostility and yelling); Dkt. # 204, Ex. A (Matson Depo. at 186:9-189:4 (choking incident)
 2 at 191:1-13 (Candelaria yelling at Matson).

3 The court notes that defendant has not directed the court to any objections it made
 4 to the introduction of evidence that it claims was not previously disclosed during the first
 5 trial. Nevertheless, the first three defenses appear to be encompassed within affirmative
 6 defenses asserted in defendant's amended answer: "2. Plaintiff's alleged harms and
 7 injuries were contributed to or caused by Plaintiff's own actions, omissions, misconduct,
 8 or negligence"; "3. Plaintiff has failed to exhaust her contractual and/or administrative
 9 remedies"; "6. Plaintiff's claims are barred, in whole or in part, because Defendant's
 10 actions with respect to Plaintiff were in good faith based upon legitimate non-
 11 discriminatory and non-retaliatory factors unrelated to any unlawful purpose or bias."
 12 Dkt. # 16-1 at 4-5. Accordingly, the court will allow defendant to pursue these
 13 affirmative defenses.

14 With respect to the last "defense," the court believes that defendant has not raised
 15 a legally cognizable defense. Defendant argues that a hostile work environment claim
 16 requires allegations that are "sufficiently related" as to coalesce into a single hostile work
 17 environment claim. Dkt. # 199 at 6. However, the cases that are binding on this court are
 18 statute of limitations cases, and the court is not persuaded by the courts from the District
 19 of Columbia Circuit.⁷ In *Antonius v. King County*, 153 Wash. 2d 256, 268, 103 P.3d 729
 20 (2005), the Washington Supreme Court adopted the reasoning and language of the
 21 Supreme Court in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101
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 24 ⁷ In *Baird v. Gotbaum*, 662 F.3d 1246, 1252 (D.C. Cir. 2011), the court, quoting selective
 25 portions from *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002)
 26 affirmed the district court's conclusion that acts giving rise to a hostile work environment claim
 27 must be adequately connected to each other, as opposed to being an array of unrelated
 discriminatory acts, irrespective of the limitations issue. This court respectfully disagrees with
Baird, and does not believe that the Ninth Circuit or the Washington Supreme Court would
 follow *Baird*'s broad reading of *Morgan* for the reasons stated below.

1 (2002) to determine whether an employer is liable for hostile work environment conduct
 2 that occurred more than three years before the plaintiff filed suit.

3 In *Morgan*, the Supreme Court granted *certiori* to resolve a circuit split regarding
 4 whether acts that fall outside of a statutory time period for filing charges set forth in 42
 5 U.S.C. § 2000e-5(e)⁸ are actionable under Title VII. *Id.* at 108. The Court identified two
 6 critical questions it had to resolve for both discrete discriminatory acts and hostile work
 7 environment claims: “What constitutes an ‘unlawful employment practice’ and when has
 8 that practice ‘occurred?’” *Id.* at 110. The court identified the difference between
 9 “discrete acts” and a hostile work environment claim. “Discrete acts such as termination,
 10 failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident
 11 of discrimination and each retaliatory adverse employment decision constitutes a separate
 12 actionable ‘unlawful employment practice.’” *Id.* at 114. In contrast, hostile environment
 13 claims by [t]heir very nature involve[] repeated conduct.” *Id.* at 115. “The ‘unlawful
 14 employment practice’ therefore cannot be said to occur on any particular day. It occurs
 15 over a series of days or perhaps years and, in direct contrast to discrete acts, a single act
 16 of harassment may not be actionable on its own.” *Id.* Hostile environment “claims are
 17 based on the cumulative effect of individual acts.” *Id.*

18 The Supreme Court held that discrete discriminatory acts are not actionable if time
 19 barred, even if they are related to acts alleged in timely filed charges, and that each
 20 discrete discriminatory act starts a new clock for filing charges. *Id.* at 113. The Supreme
 21 Court also indicated that where incidents constituting a hostile work environment are part
 22 of one unlawful employment practice, the employer may be liable for all acts that are part
 23 of this single claim, even if the act occurred outside of the limitations period. *Id.* at 118.
 24 When determining whether a charge is timely filed, the “court’s task is to determine

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 26 ⁸ Section 2000e-5(e)(1) requires an employee to file a charge with the EEOC within 300
 27 days of the employment practice in a State that has an entity with the authority to grant or seek
 relief with respect to the alleged unlawful practice, or 180 days for all other States.

1 whether the acts about which an employee complains are part of the same actionable
 2 hostile work environment practice, and if so, whether any act falls within the statutory
 3 time period.” *Id.* at 120.

4 The Washington Supreme Court relied on and adopted *Morgan*’s reasoning and
 5 holdings to determine whether the trial court properly granted summary judgment as to
 6 any acts allegedly occurring more than three years before suit was filed. *Antonius*, 153
 7 Wash. 2d at 270. The Court, quoting *Morgan*, found:

8 The acts must have some relationship to each other to constitute part of the
 9 same hostile work environment claim, and if there is no relation, or if ‘for
 10 some other reason, such as certain intervening action by the employer’ the
 11 act is ‘no longer part of the same hostile environment claim, then the
 12 employee cannot recover for the previous acts’ as part of one hostile work
 13 environment claim.

14 *Id.* at 271.

15 The court finds that *Antonius* and *Morgan* do not stand for the broad proposition
 16 asserted by defendant that a hostile work environment claim requires that all the acts be
 17 “sufficiently related” to constitute the same hostile work environment claim, irrespective
 18 of the limitations issue.⁹ Rather, *Antonius* and *Morgan* apply when a defendant asserts
 19 the statute of limitations as a defense, and the court must determine whether certain acts
 20 are time barred. Only then does the “sufficiently related” framework apply to determine

21 ⁹ Indeed, if such a requirement existed, the court believes that the countless cases reciting
 22 the elements required to establish a claim for hostile work environment would have included
 23 such a requirement. Instead, case after case has repeatedly held that to prevail on a claim for
 24 hostile work environment under the Washington Law Against Discrimination, plaintiff must
 25 prove that the harassment (1) was unwelcome, (2) was because of her sex, (3) affected the terms
 26 and conditions of her employment, and (4) is imputable to defendant. *Antonius*, 153 Wash. at
 27 261. The court has not found a single Washington or Ninth Circuit case that adds a fifth
 requirement that all the acts within the limitations period be “sufficiently related” to constitute
 the same hostile work environment claim. Such a requirement is also not reflected in the
 Washington Pattern Instructions or Ninth Circuit Model Instructions for hostile work
 environment. WPI 330.23; 9th Cir. Manual of Model Civ. Jury Instructions 10.2A-C.

1 whether the acts that make up the hostile environment claim that occurred outside the
2 limitations period are time-barred. Defendant does not assert a statute of limitations
3 defense or otherwise indicate that any of plaintiff's remaining allegations are barred by
4 the statute of limitations.¹⁰

5 Accordingly, the court DENIES defendant's request to assert a "defense" that
6 plaintiff's hostile work environment claim is composed of unrelated incidents that cannot
7 be connected to constitute the same hostile work environment claim.

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9 Dated this 8th day of November, 2013.

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12 The Honorable Richard A. Jones
13 United States District Judge

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¹⁰ Nevertheless, the court believes that plaintiff's remaining allegations constitute non-discrete acts as defined by *Antonius* and *Morgan*.